The University of the State of New York

The State Education Department
State Review Officer
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No. 24-058

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Michael Gindi, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be fully reimbursed for her son's tuition costs at the International Academy for the Brain (iBrain), 1:1 nursing services, and transportation services for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be fully recited here in detail. Briefly, the parent reported that the student has received diagnoses of a "brain injury, cystic encephalomalacia, global [central nervous system (CNS)] injury, seizure disorder, hypoxic-ischemic encephalopathy, cerebral palsy, optic atrophy, cortical visual impairment, exotropia, developmental delay, feeding problems, asthma, adenoid hypertrophy, scoliosis, [] congenital subluxation of hip unilateral, and shoulder dystocia" (Parent Ex. K ¶ 3). The student is non-verbal and non-ambulatory with significant impairments in "language, memory, attention, reasoning, sensory, perceptual and motor abilities, physical functions, information processing, and speech" (id. ¶¶ 2, 4). The student has attended iBrain since the 2018-19 school year (id. ¶ 9).[1] In an iBrain report and education plan

[1] The Commissioner of Education has not approved iBrain as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

dated April 27, 2023, iBrain staff described the student's present levels of needs and performance, goals, and services to be provided to the student beginning June 5, 2023 (see Parent Ex. D).

The CSE convened on May 30, 2023, to formulate the student's IEP for the 2023-24 school year (see generally Parent Ex. C).[2] The May 2023 CSE found the student eligible for special education services as a student with a traumatic brain injury (TBI) (id. at p. 1).[3] Due to the student's "significant deficits in cognitive, adaptive, communicative and physical development" the May 2023 CSE recommended a program of adapted physical education and a 12:1+(3:1) special class in a district specialized school (id. at pp. 28, 47, 55). In addition, the May 2023 CSE recommended related services of five 60-minute sessions per week of individual occupational therapy (OT), one 60-minute session per week of group parent counseling and training, five 60-minute sessions per week of physical therapy (PT), full-time 1:1 individual school nurse services, five 60-minute sessions per week of individual speech-language therapy, and three 60-minute sessions per week of individual vision education services, together with a full-time individual paraprofessional and assistive technology services (id. at pp. 48-49, 55). The parent disagreed with the recommendations contained in the May 2023 IEP, as well as with the particular public-school site to which the district assigned the student to attend for the 2023-24 school year and, as a result, notified the district in a letter dated June 20, 2023 of her intent to unilaterally place the student at iBrain (Parent Ex. E).

On June 27, 2023, the parent signed an enrollment contract with iBrain for the student's attendance during the 2023-24 school year from July 5, 2023 through June 21, 2024 (Parent Ex. F).[4] Additionally, the parent executed a "School Transportation Annual Service Agreement" (transportation agreement) with Sisters Travel and Transportation Services, LLC (Sisters Travel) to provide the student with round-trip transportation between his home and iBrain during the 2023-24 school year beginning on July 1, 2023 and concluding on June 30, 2024 (Parent Ex. G).[5] Further, the parent executed an annual nursing service agreement with B&H Health Care, Inc. – d/b/a Park Avenue Home Care (Park Avenue) to provide the student 1:1 private nursing services during school days and a 1:1 transportation nurse from July 5, 2023 through June 21, 2024 (Parent Ex. H).[6]

In a due process complaint notice, dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year based upon various procedural and substantive violations of the IDEA (Parent Ex. A at pp. 4-7).

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[2] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

[4] A representative from iBrain signed the enrollment contract on July 2, 2023 (Parent Ex. F).

[5] The transportation agreement does not include the date that the parent executed the agreement (Parent Ex. G).

[6] The nursing service agreement does not indicate the date that the parent executed the agreement (Parent Ex. H).

The parent sought pendency in a prior unappealed IHO decision dated September 15, 2022 which found iBrain to be an appropriate unilateral placement (id. at pp. 1-2; see generally Parent Pendency Ex. B).[7] As relief, the parent sought an order directing the district to directly fund iBrain for the student's tuition in addition to the costs of his related services, 1:1 nursing services, and the services of a 1:1 paraprofessional; to directly or prospectively fund the costs of the student's special education transportation services with "limited travel time, a 1:1 transportation nurse, air conditioning, a lift bus, and a regular-sized wheelchair"; to fund the costs of an independent educational evaluation (IEE) consisting of a neuropsychological evaluation by a provider selected by the parent; to reconvene a CSE meeting to "address changes if necessary"; and to conduct all necessary evaluations of the student within 30 days (Parent Ex. A at p. 8). The district submitted a due process response dated July 7, 2023, generally denying the material allegations contained in the due process complaint notice (see Suppl. Ex. 2).

On August 22, 2023, the IHO held a pendency hearing and on September 17, 2023 and ordered the district to pay for the tuition and related services costs of the student's attendance at iBrain as well as the transportation costs of the student to and from iBrain (Tr. pp. 14-32; Sept. 17, 2023 Interim IHO Decision at p. 5). Thereafter, on October 10, 2023, in light of "new information" and upon consent of the district, the pendency order was amended to include funding of nursing services for the student (Oct. 10, 2023 Interim IHO Decision at pp. 3-4).

After some preliminary hearing dates, an impartial hearing convened on October 19, 2023 (Tr. pp. 57-149). In a decision dated January 8, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 4, 12-15).[8] However, the IHO reduced the parent's award of tuition funding at iBrain and also reduced the award of direct funding for special transportation and nursing services for days such services were not used (id. at pp. 13-14, 15-18).

More specifically, in discussing the appropriateness of iBrain, the IHO found a lack of evidence that the student was receiving academic instruction by a special education teacher "qualified" to address the student's "specific unique educational needs" and the IHO therefore reduced the percentage of tuition funding by the amount of scheduled academic instruction for the student in the amount of 2.5 hours per week (IHO Decision at pp. 13-14). Next, the IHO reviewed equitable considerations with respect to nursing services and although she found that the parent was entitled to funding for the nursing services because the hearing record demonstrated that the student required nursing services during school hours, the IHO found that the payment for the transportation nursing services would be limited to those days that the student attended iBrain in person (id. at pp. 15-16). The IHO also found that the funding of the nursing services provided

[7] In the prior proceeding, the parent filed a due process complaint notice dated July 6, 2022 alleging that the district denied the student a FAPE for the 2022-23 school year (Parent Pendency Ex. B at p. 3). The IHO who presided over the prior proceeding found that the district failed to offer the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement, and the equitable considerations weighed in favor of an award of direct tuition funding (id. at pp. 7-9).

[8] In a corrected decision also dated January 8, 2024, the IHO amended the decision to add a date to the list of hearing dates (October 3, 2023) and to note the appearances of the parties on August 22, 2023 (IHO Decision at pp. 1-2). For purposes of this decision, I shall reference the corrected decision dated January 8, 2023.

during the school day would only be paid upon the submission of evidence of the days that the student was in school or receiving remote instruction at home (id. at p. 16). In connection with transportation, the IHO found when reviewing the equities that in light of the student's medical conditions and the student receiving a "substantial portion of his instruction at home," it was unreasonable for the parent to agree to transportation regardless of whether the student would be attending school in person (id. at p. 17). Accordingly, the IHO found that Sisters Travel was only entitled to payment for the days that the student attended school in person (id. at pp. 17-18).

The IHO ordered the parent to provide the district with proof of the "exact number of iBrain school days," the student's in person attendance at iBrain, the student's attendance for remote instruction at iBrain, the student's iBrain tuition costs, the amount of any funds the parent already paid to iBrain for tuition, and a breakdown of the Park Avenue nursing cost that was applicable to the transportation nurse and that which was applicable to the nursing services during the instructional part of the school day (IHO Decision at p. 18). Upon the district's receipt from the parent of such information, the IHO ordered the district to reimburse and fund the student's tuition costs at iBrain based on a 38 hour instructional week, to pay Sisters Travel the costs of transportation only for those days the student attended iBrain and transportation was provided, and to pay Park Avenue nursing costs "for each day of the 2023-24 school-year that a nurse is/was with the student during the [iBrain] instructional school day either in person or remotely at the rate for the instructional portion of nursing, and that the portion of the award to Park Avenue for nursing costs that reflects a transportation nurse shall only be paid for when "transportation is/was actually provided for the student to and from [iBrain] for in person instruction" (id. at pp. 18-19).

IV. Appeal for State-Level Review

The parent appeals. The parent first argues that the IHO erred in reducing the amount of the tuition award under the iBrain enrollment contract. The parent asserts that the reduction for lack of evidence of academic instruction was arbitrary and contrary to case law that private placements are not required to have teachers with qualifications and certifications in special education. Second, the parent argues that the IHO erred in reducing the funding for the transportation services. The parent asserts that there was no evidence that the transportation contract was unreasonable and the IHO had no authority to alter the terms of the transportation contract. Third, the parent claims that the IHO erred in modifying the terms of the nursing contract for funding only nursing services that were provided in school and when used during transportation. Lastly, the parent seeks to affirm the findings that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement, that equitable considerations supported the parent's claims, and that the parent was entitled to an award of direct payment to the providers. Ultimately, the parent seeks full and direct payment of the iBrain tuition and related services, nursing services, and transportation services for the 2023-24 school year.

In its answer, the district generally denies the material allegations contained in the request for review. The district asserts that the IHO properly limited the relief for both the transportation services and nursing services. The district argues that if the student attends iBrain remotely then the student does not require transportation or a 1:1 nurse. The district asserts that equitable considerations support a limitation on the awarded tuition, transportation, and nursing services to those days in which the student attends in-person instruction at iBrain. The district also asserts that the transportation costs set forth in the contract between the parent and Sister Travel are

excessive and any award of transportation costs should instead be awarded at some rate between the Medicaid rate and amount charged by Sisters Travel. Similarly, the district argues that the rate for nursing services should instead be at the Medicaid rate rather than the rate in the nursing services contract. Finally, the district argues that the IHO correctly reduced the iBrain tuition award, and that even if the IHO erred in reducing the award under an analysis of whether iBrain provided the student with appropriate programming to meet his special education needs, equitable considerations support a reduction in tuition because the costs of tuition and certain services at iBrain are "patently unreasonable" and excessive (Answer ¶¶ 33, 35).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[9]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

[9] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

At the outset, the parties have not appealed the following IHO findings: that the district failed to offer the student a FAPE for the 2023-24 school year; that iBrain was an appropriate unilateral placement for the student for the 2023-24 school year; that the student required 1:1 nursing services; and that the parent was entitled to an award of direct funding for the costs of the student's tuition at iBrain for the 2023-24 school year (see generally Req. for Rev.; Answer). As a result, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Therefore, the only issues left to be resolved are whether the IHO erred in reducing the relief awarded to the parent, specifically the amount of reimbursement for iBrain tuition and costs, transportation services, and nursing services (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] ["The first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any."]).

A. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

1. iBrain Tuition

I turn first to the parent's contention that the IHO erred by reducing the parent's award for iBrain tuition costs based upon her finding a lack of evidence that the student received academic instruction at iBrain (IHO Decision at p. 14).[10] The IHO found the evidence in the hearing record did not demonstrate whether the student had a special education teacher or whether "that teacher had reasonable qualifications specifically related to the student's deficits" (id. at pp. 13-14).[11] However, she did not find that the lack of evidence about the academic instruction at iBrain rendered the unilateral placement inappropriate, rather she determined it was a reason to reduce the parent's award of tuition reimbursement (id. at p. 14). The IHO reduced the amount of tuition reimbursement at iBrain by "2.5 hours per week of scheduled academics (five days per week for 30 minutes), and 2 hours per week of [m]ath/[l]iteracy (two days per week for 60 minutes)" and calculated the student's instructional schedule at iBrain for purposes of a tuition award to be "38 hours per week (42.5 hours minus 4.5 hours)" (id.).

In reviewing this analysis by the IHO regarding the student's academic instruction at iBrain, the IHO comingled consideration of whether the unilateral services were reasonably calculated to enable the child to receive educational benefits—the second prong of the Burlington/Carter analysis—with equitable considerations—the third prong of the Burlington/Carter analysis (see IHO Decision at pp. 10-14). As the Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations within the IHO's analysis of the appropriateness of the unilateral placement (A.P., 2024 WL 763386 at

[10] According to the evidence in the hearing record, the student receives 30 minutes of academic instruction five days per week "in addition to small group instruction (2-3 children) throughout the day" (see Tr. pp. 114-16; Parent Ex. D at p. 2; Dist. Ex. 7 at p. 1). The iBrain report and education plan provides detailed information regarding the student's participation in academics using a switch device with his head with a recorded saying and annual goals for the student's academics in literacy, math, and social skills (Parent Ex. D at pp. 14-15, 37-39).

[11] Teachers at a unilateral placement need not be State-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]); however, there must be objective evidence of special education instruction or supports that are specially designed by the student's providers at the private school who have reasonable qualifications that are specifically related to the student's deficits.

*2 [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hour day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]).

As previously stated, the IHO determined that iBrain provided the student with specially designed instruction to meet his unique needs during the 2023-24 school year and that finding has not been appealed by the district (see IHO Decision at p. 12). Therefore, the IHO erred in reducing the amount of the iBrain tuition award under an appropriateness analysis and without making any findings that equitable considerations weighed against the parent to support her determination to reduce the iBrain tuition award (see A.P., 2024 WL 763386 at *2). Rather, the IHO conducted an equities analysis and expressly determined that equitable considerations weighed in the parent's favor (see IHO Decision at pp. 14-15). She specifically found that there was no evidence in the hearing record to find that the parent failed to cooperate with the district, that the parent submitted a 10-day notice to the district advising of her concerns about the district's program, and that there was "nothing about the parent's conduct" to warrant a finding that the equities favored the district (id.). Although the district argues on appeal that the iBrain tuition is "patently unreasonable" and excessive, the hearing record is not sufficiently developed in this case to find such arguments as grounds for reducing tuition at iBrain under equitable considerations and they do not overcome the district's failure to appeal the IHO's determination that equities favored the parent. For these reasons, I will modify the IHO's determination that reduced the tuition award at iBrain and direct the district to fully fund the student's tuition costs at iBrain as reflected in the parent's enrollment contract.

2. Nursing Services and Transportation

I turn next to the parent's contention that the IHO erred in reducing the relief awarded to the parent for nursing services provided by Park Avenue and transportation provided by Sisters Travel due to equitable considerations. The parent argues that the IHO erred by denying her request to fund the student's 1:1 nursing and transportation costs in full and consistent with the parent's applicable contracts for nursing and transportation services. The district argues to uphold the IHO's award as ordered because the district should not be required to pay for services that were not rendered, and the cost of the 1:1 nursing and transportation services were excessive.

With respect to nursing, the IHO ordered that the district's responsibility for "payment for the transportation portion of nursing services [wa]s limited to the days that the student attends [iBrain] in person" and "[p]ayment for nursing services during the school day shall be provided only upon evidence of the days that the student [wa]s either in school or receiving remote telehealth instruction at home" (IHO Decision at p. 16).[12] Further, the IHO directed the parent to provide a

[12] Although a monthly attendance record for the 2023-24 school year was entered into evidence, the attendance only reflects July 2023 through part of October 2023, and only notes when the student was present without specifying if it was in person or at home (Dist. Ex. 8).

"breakdown of the Park Avenue nursing cost that [wa]s applicable to the transportation nurse and the cost applicable to the nurse during the instructional part of the school day" (id. at p. 19).

Similar to the IHO's denial of full funding for the student's 1:1 nursing services, the IHO reduced the amount awarded for transportation services because she found it was unreasonable for the parent to agree to pay for transportation when "most, or a substantial portion of his instruction [was] at home" (IHO Decision at p. 17). The IHO also found that equitable considerations did not support ordering the district to pay the full amount of the contracted transportation services, but to pay for only those days in which the student attended school in-person (id. at pp. 17-18).

An independent review of the evidence in the hearing record reflects that the parent entered into an annual nursing service agreement with Park Avenue for the period of July 5, 2023 through June 21, 2024 (Parent Ex. H). The agreement set forth that the student would receive 1:1 private nursing services at school during school days and 1:1 transportation nurse services to and from the school during school days (approximately 218 days) (id. at pp. 1-2). The agreement set forth an annual rate that was inclusive of both the nursing services in-school and during transportation but did not delineate the breakdown of services for in-school and during transportation (id. at pp. 2-3). Additionally, the annual fee was based upon school days even if the nursing services were not used by the student (id. at p. 3).

Further, the parent entered into a contract with Sisters Travel for the provision of the student's transportation to and from iBrain for the 12-month 2023-24 school year from July 1, 2023 through June 30, 2024 (Parent Ex. G). The contract set forth an annual rate for the services and indicated that fees were based on school days even if the services were not used by the student (id. at p. 2). To summarize, the parent's nursing services agreement with Park Avenue and transportation agreement with Sisters Travel both set forth an annual rate and provide that fees in the contract are based on the number of school days in the school year whether the student used the services or not (see Parent Exs G; H). The IHO's reduction of an award to the parent of direct funding for only those 1:1 transportation nursing services and special transportation services that were actually provided to the student during the 2023-24 school year presupposes without evidence that the parent acted unreasonably in entering into the contracts. Thus far, courts assessing unilateral placements arranged by parents have not required parents to establish that they obtained the private placement and services at the lowest possible cost when assessing whether the unilateral placement is appropriate or that equitable considerations favor the parents. [13] During the impartial hearing in this case, the district did not offer any evidence that other 1:1 transportation nursing services or special transportation options were available to meet the student's needs, which would have resulted in a more reasonable cost, nor did it identify any other company with whom the parent could have contracted that would not have charged for the days when the student did not utilize the services. Accordingly, the evidence in the hearing record does not support the IHO's order to require the district to fund only those 1:1 transportation nursing services and special

[13] The parent testified that she learned about Sisters Travel from iBrain and did not look into other transportation options (Tr. p. 134). She was unable to recall if she requested transportation from the district (Tr. pp. 135-36). On May 31, 2023, the district sent an email to iBrain asking if iBrain would be seeking transportation for its students from the district (Dist. Ex. 12 at p. 3). In response, the iBrain director of special education stated that she was unaware of any students that would be seeking transportation from the district (id. at p. 1). With respect to the nursing services, the parent also testified that she learned of the agency for nursing services from iBrain (Tr. p. 137).

transportation services actually delivered to the student instead of the full amount of the parent's financial obligation pursuant to the terms of the contracts.

Moreover, as explained more fully below, there is also insufficient evidence in the hearing record, such as a cost comparison with other similar providers in the same geographic area, upon which to base a finding that as an equitable matter the amount is excessive or unreasonable. Although the district contends on appeal that the cost for the transportation services Sisters Travel provided was unreasonable, during the impartial hearing, the district stated that it would rest its case on the evidence submitted into the hearing record and would not present any witnesses (Tr. pp. 63, 78-79; see generally Dist. Exs. 1-8, 10-13). As evidence, the district submitted a Medicaid Provider Policy and Billing Handbook (see generally Dist. Ex. 13). In a brief opening statement, the district stated that it intended to "challenge the appropriateness of the placement as well as the requests for transportation, nursing" and then rested its case (Tr. p. 79). For the first time in its closing brief, the district asserted that the transportation contract and nursing contract were "not appropriate based on the rate" and incorrectly required payment even when the services were not used (IHO Ex. IV at p. 12).

Generally, an excessive cost argument focuses on whether the rate charged for services were reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Upon my independent review of the hearing record, I find that the IHO erred by conducting a cost analysis without sufficient fact evidence to support it. For example, the IHO's rationale for reducing the amounts awarded for the student's transportation services relied on her determination that the parent needed to document each day that the student used the private transportation, but absent any evidence that these services were not delivered to the student, the IHO essentially appeared to alter the terms of the contractual relationship without evidence or an articulated equitable basis to do so (see IHO Decision at pp. 16-18; see generally Tr. pp. 57-149; Parent Ex. G). The IHO may have reason to question the parties on the facts presented, but if that is so, then it is up to the IHO to develop the factual record to provide a basis for her findings or provide clear directives to the parties to do so.

In addition, while the district submitted a document reflecting Medicaid reimbursement rates from March 2018, the district did not present evidence demonstrating that any private providers contemporaneously accepted similar rates for either nursing or transportation services, or moreover, any evidence that rates as low as the 2018 Medicaid rates were paid by the district in the 2023-24 school year for transportation services for these students (see generally Tr. pp. 1-149; Dist. Exs. 1-8, 10-13). In other words, a Medicaid reimbursement rate is set by the government, which has very different bargaining power than private citizens and absent evidence that it is likely that parents can acquire services at such rates, the district's argument is unpersuasive. The district did not articulate any specific calculation arising out of the Medicaid rate document in its post-hearing brief (IHO Ex. IV at pp. 10-12). More plausible might be evidence of statistics presented from either the United States Bureau of Labor Statistics or New York State Department of Labor's Occupational Employment and Wage Statistics as suggested by an IHO in a recent case (see

Application of a Student with a Disability, Appeal No. 23-078), but the district in this case has not presented evidence of market-based data of this variety.[14]

As a further note, if the IHO was concerned with excessive costs, it would have been permissible for her to instruct the parties to further develop the evidentiary record with respect to that issue. However, in the present matter, the IHO's determination that the district should not be required to fund the costs of the student's 1:1 nursing services and special transportation services that were not delivered to the student despite the parent's contract with the providers is without support in the evidentiary record. Accordingly, the parent's appeal is sustained and I will therefore modify the IHO determinations to reduce district funding of the student's nursing and transportation costs.

VII. Conclusion

Having determined that the IHO erred by reducing the amount that the district would be responsible to fund for the tuition costs at iBrain, the 1:1 nursing services provided by Park Avenue, and the transportation services provided by Sisters Travel for the student's 2023-24 school year, her decision must be modified to provide full reimbursement as reflected in the applicable contracts.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 8, 2024, is modified by reversing those portions which reduced or denied the amount of funding to be paid by the district for the student's tuition costs at iBrain, and unilaterally obtained 1:1 nursing services and special transportation services for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall fully fund the costs of the student's tuition at iBrain, and unilaterally obtained 1:1 nursing services and special transportation for the 2023-24 school year as set forth in the relevant contracts in the hearing record.

Dated: **Albany, New York**
April 18, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER

[14] If an IHO were to take judicial notice of such government-published statistical information, it would only be appropriate to do so after disclosing to the parties his or her intention of doing so and providing them with an opportunity to be heard.